

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY HOLMES, as Administrator of
the Estate of his father, RONALD
HOLMES, and in his individual capacity,
and on behalf of his father's heirs and next
of kin,

PLAINTIFF,

V.

NATIONAL FOOTBALL LEAGUE,

DEFENDANT.

CIVIL ACTION NO. 2:13-cv-05031-AB

CIVIL ACTION COMPLAINT

JURY TRIAL DEMANDED

Related to MDL-2323
*IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION*

Related to 11-cv-05209-AB
*Easterling, et al. v. National Football
League, Inc.*

**PETITIONER'S MOTION FOR RELIEF FROM A
JUDGMENT OR ORDER PURSUANT TO FED. R. CIV. P. 60**

Petitioner, Jeffrey Holmes, as Administrator of the Estate of Ronald Holmes, respectfully seeks relief from the Special Master's Post-Appeal Notice of Denial of Monetary Award Claim dated December 22, 2017. In support thereof, Class Counsel avers as follows:

1. On April 22, 2015, this Court approved a Settlement Agreement entered between the National Football League ("NFL") and retired NFL players or their legal representatives with respect to brain injuries sustained during the course of their professional careers in the NFL. *See* Doc. 6510 (April 22, 2015 Order Granting Final Approval); *see also* Doc. 6481-1 (Settlement Agreement, as Amended February 13, 2015).

2. The Settlement Agreement provides an award of monetary damages to Retired NFL Players, or their legal representatives, in the event of a post-mortem diagnosis of Chronic Traumatic Encephalopathy (CTE). More specifically, Section 6.3(f) provides:

(f) A Qualifying Diagnosis of Death with CTE shall be made only for Retired NFL Football Players who died prior to the Final Approval Date, through a post-mortem diagnosis made by a board-certified neuropathologist prior to the Final Approval Date, provided that a Retired NFL Football Player who died between July 7, 2014 and the Final Approval Date shall have until 270 days from the date of death to obtain such a post-mortem diagnosis.

See Doc. 6481-1 (Settlement Agreement) at Section 6.3(f).

3. Ronald Holmes played in the NFL for 8 seasons (1985 to 1992), four with the Tampa Bay Buccaneers and four with the Denver Broncos. Throughout his career, Ronald Holmes played in 102 games and was a starting Defensive End for the Broncos in Super Bowl XXIV.

4. Ronald Holmes died on October 27, 2011 and a routine autopsy was performed by the Pierce County Medical Examiner in Tacoma, Washington.

5. Following the autopsy, the Holmes Estate obtained a written report from the medical examiner's office that did not list any abnormal brain findings or reference the preservation of any brain tissue. Nonetheless, medical records and the family's personal accounts confirmed that Ronald Holmes exhibited multiple signs of neurological deficits in the final years of his life.

6. In August 2013, the Holmes family formally retained the undersigned counsel to investigate and pursue claims against the NFL.

7. Counsel contacted the medical examiner's office in March 2014 to inquire about any remaining tissue from the autopsy and were advised, consistent with absence of any such

reference in the autopsy report, that no brain tissue had been preserved. *See* the Declaration in Petitioner's July 11, 2017 Appeal, ¶¶ 3-5, attached as Exhibit A.

8. Thereafter, Counsel continued its investigation into Ronald Holmes' medical history to determine if neurology records could qualify the Decedent for other neurocognitive benefits. Additional records failed to establish any compensable diagnoses. *Id.* at ¶ 5.

9. In April 2015, the Holmes family again contacted the medical examiner and during a second follow-up call were advised *for the first time* that brain tissue slides from Ronald Holmes' autopsy did in fact exist. *Id.* at ¶ 6.

10. The Holmes family made arrangements to ship the slides from the Pierce County Medical Examiner's office to the University of Pittsburgh in June 2015 for evaluation by board-certified neuropathologist Ronald Hamilton, M.D. Dr. Hamilton received the brain tissue samples on June 10, 2015.

11. On August 4, 2015, Dr. Hamilton positively diagnosed Ronald Holmes with CTE.

12. On April 11, 2017, following the opening of the Monetary Awards Claims Process period, Petitioner submitted a Claim to the NFL seeking a monetary award for death with CTE.

13. On June 13, 2017, the Claims Administrator rejected Petitioner's claim. *See* the June 13, 2017 Notice of Denial of Monetary Award Claim, attached as Exhibit B.

14. The Claims Administrator's sole justification for the denial was Petitioner's failure to meet the Qualifying Diagnosis deadline set forth in Section 6.3(f) of the Settlement Agreement. *Id.*

15. On July 11, 2017, Petitioner submitted an appeal to the Claims Administrator, explaining the extenuating circumstances and requesting that his claim be approved

notwithstanding Decedent's post-mortem CTE diagnosis a mere three and a half months beyond the Qualifying Diagnosis deadline. *See* Exhibit A (July 11, 2017 Appeal).

16. On August 21, 2017, the NFL issued a memorandum supporting the denial of Petitioner's Appeal. *See* the Response of the NFL Parties in Opposition to the Appeal of Claim Determination Filed by Ronald Holmes, attached as Exhibit C. The NFL's insistence that equitable tolling is inapplicable is contrary to the law.

17. On December 22, 2017, the Special Master rejected Petitioner's appeal, again citing the Qualifying Diagnosis deadline. *See* the December 22, 2017 Post-Appeal Notice of Denial of Monetary Award Claim, attached as Exhibit D.

18. Under Section 27.1 of the Settlement Agreement, this Court has continuing and exclusive jurisdiction over all parties, including the Claims Administrator and the Special Master, with respect to the terms of the Settlement and has authority to resolve any disputes arising thereof upon motion to the Court. *See* Doc 6481-1 (Settlement Agreement) at Section 27.1.

19. The Settlement Agreement further provides that in resolving such disputes, the Court will make a final and binding determination based upon a showing by the appellant of clear and convincing evidence. *Id.* at Section 9.8.

20. "The Court has general equitable power to modify the terms of a class action settlement." *Sutton v. Hopkins County*, 2009 U.S. Dist. LEXIS 95229, *8 (W.D. KY 2009)(citing *In re CENDANT Corp.*, 189 F.R.D. 321, 323 (D.N.J. 1999)).

21. "Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers...to protect unnamed, but interested persons." *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972). "A Court may assert this power to allow late-filed proofs of

claim and late-cured proofs of claim.” *Id.*; see also *In re "Agent Orange" Product Liability Litig.*, 689 F. Supp. 1250, 1263 (E.D.N.Y. 1988); Manual For Complex Litig. § 30.47 at 248 (3d ed. 1995).

22. Courts considering requests to extend deadlines for filing proofs of claim and other settlement documents generally subject the request to a “good cause” or “excusable neglect” analysis. *Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 396 (3d Cir. 1981); *In re CENDANT Corp.*, 189 F.R.D. at 323 (citations omitted).

23. Fed. R. Civ. P. 60(b) provides that on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding in the case of mistake, inadvertence, surprise, excusable neglect or any other reason that justifies relief. Fed. R. Civ. P. 60(b)(1) and (6).

24. The determination of whether a party’s neglect is “excusable” is an equitable one, in which courts are to take into account all relevant circumstances surrounding a party’s failure to meet a deadline. *Chemetron Corp. v. Jones*, 72 F.3d 341, 349 (3d Cir. 1995)(citing *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)).

25. In *Pioneer*, the U.S. Supreme Court identified several factors to consider in evaluating “excusable neglect”, including the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Pioneer Inv. Servs.*, 507 U.S. at 395; see also *Nara v. Frank*, 488 F.3d 187, 193 (3d Cir. 2007).

26. For all of the reasons more fully stated in Petitioner’s contemporaneously filed Brief, Petitioner’s request satisfies a “good cause” analysis and each of the *Pioneer* factors.

27. For all of the reasons more fully stated in Petitioner's contemporaneously filed Brief, equitable tolling should apply because Petitioner has made a clear showing that extenuating circumstances prevented him from timely asserting his rights. *In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, 2017 U.S. Dist. LEXIS 34005, *27-28 (E.D. Pa. Mar. 9, 2017).

WHEREFORE, Petitioner respectfully requests that this Court set aside the Special Master's Denial of Petitioner's Monetary Award Claim and enter the attached Order compelling the Claims Administrator to recognize the Decedent's Qualifying Diagnosis of CTE as timely.

Dated: January 19, 2018

RESPECTFULLY SUBMITTED,

/s/ Sol H. Weiss

Sol H. Weiss, Esquire (I.D. 15925)

Larry E. Coben, Esquire (I.D. 17523)

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Co-Lead Class Counsel

CERTIFICATE OF SERVICE

I, Sol H. Weiss, hereby certify that, on January 19, 2018, Petitioner's Motion for Relief from a Judgment or Order Pursuant to Fed. R. Civ. P. 60 was filed and made available via CM/ECF to all counsel of record.

ANAPOL WEISS

/s/ Sol H. Weiss
Sol H. Weiss

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY HOLMES, as Administrator of
the Estate of his father, RONALD
HOLMES, and in his individual capacity,
and on behalf of his father's heirs and next
of kin,

PLAINTIFF,

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NATIONAL FOOTBALL LEAGUE,

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Related to MDL-2323
*IN RE: NATIONAL FOOTBALL
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Related to 11-cv-05209-AB
*Easterling, et al. v. National Football
League, Inc.*

ORDER

AND NOW, on this _____ day of _____, 2018, upon consideration of
Petitioner's Motion for Relief from a Judgment or Order Pursuant to Fed. R. Civ. P. 60, it is
hereby **ORDERED** that the Motion is **GRANTED**. The Special Master's Post-Appeal Notice of
Denial of Monetary Award Claim dated December 22, 2017 shall be set aside and the Claims
Administrator is hereby ordered to recognize the Decedent Ronald Holmes' Qualifying
Diagnosis of Chronic Traumatic Encephalopathy (CTE) as timely.

BY THE COURT:

J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY HOLMES, as Administrator of
the Estate of his father, RONALD
HOLMES, and in his individual capacity,
and on behalf of his father's heirs and next
of kin,

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LEAGUE PLAYERS' CONCUSSION
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*Easterling, et al. v. National Football
League, Inc.*

**PETITIONER'S BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM A
JUDGMENT OR ORDER PURSUANT TO FED. R. CIV. P. 60**

Petitioner, Jeffrey Holmes, as Administrator of the Estate of Ronald Holmes, submits this Brief in support of his Fed. R. Civ. P. 60 Motion seeking relief from the Special Master's Denial of Monetary Award Claim.

I. QUESTION PRESENTED

Whether this Court should set aside the Special Master's denial of Petitioner's Monetary Award Claim because Petitioner's failure to meet the Settlement Agreement's Qualifying Diagnosis deadline resulted from "excusable neglect" under Fed. R. Civ. P. 60 and there was good cause for the brief delay where, despite due diligence, extenuating circumstances prevented Petitioner from timely obtaining the brain tissue samples that confirmed his father, Ronald Holmes', post-mortem diagnosis of Chronic Traumatic Encephalopathy (CTE).

Suggested Answer: Yes.

II. STATEMENT OF FACTS

On April 22, 2015, this Court approved a Settlement Agreement entered between the National Football League (“NFL”) and retired NFL players or their legal representatives with respect to brain injuries sustained during the course of their professional careers in the NFL. *See* Doc. 6510 (April 22, 2015 Order Granting Final Approval); *see also* Doc. 6481-1 (Settlement Agreement, as Amended February 13, 2015). Among other brain injuries, the Settlement Agreement provides an award of monetary damages to Retired NFL Players, or their legal representatives, in the event of a post-mortem diagnosis of CTE. More specifically, Section 6.3(f) provides:

(f) A Qualifying Diagnosis of Death with CTE shall be made only for Retired NFL Football Players who died prior to the Final Approval Date, through a post-mortem diagnosis made by a board-certified neuropathologist prior to the Final Approval Date, provided that a Retired NFL Football Player who died between July 7, 2014 and the Final Approval Date shall have until 270 days from the date of death to obtain such a post-mortem diagnosis.

See Doc. 6481-1 (Settlement Agreement) at Section 6.3(f).

A. Ronald Holmes’ Post-Mortem CTE Diagnosis

Ronald Holmes played in the NFL for 8 seasons (1985 to 1992), four with the Tampa Bay Buccaneers and four with the Denver Broncos. Throughout his career, Ronald Holmes played in 102 games and was a starting Defensive End for the Broncos in Super Bowl XXIV. Ronald Holmes died on October 27, 2011 and a routine autopsy was performed by the Pierce County Medical Examiner in Tacoma, Washington. Following the autopsy, the Holmes Estate obtained a written report from the medical examiner’s office that did not list any abnormal brain findings or reference the preservation of any brain tissue. Nonetheless, medical records and the

family's personal accounts confirmed that Ronald Holmes exhibited multiple signs of neurological deficits in the final years of his life.

In August 2013, the Holmes family formally retained the undersigned counsel to investigate and pursue claims against the NFL. Medical records were gathered to determine if Ronald Holmes had been diagnosed with Dementia or Alzheimer's disease as the autopsy report did not identify a pathological disease pertinent to such claims. Counsel contacted the medical examiner's office in March 2014 to inquire about any remaining tissue from the autopsy and were advised, consistent with absence of any such reference in the autopsy report, that no brain tissue had been preserved. *See* the Declaration in Petitioner's July 11, 2017 Appeal, ¶¶ 3-5, attached as Exhibit A. Thereafter, Counsel continued its investigation into Ronald Holmes' medical history to determine if neurology records could qualify the Decedent for other neurocognitive benefits. Additional records failed to establish any compensable diagnoses. *Id.* at ¶ 5.

In April 2015, the Holmes family again contacted the medical examiner and during a second follow-up call were advised *for the first time* that brain tissue slides from Ronald Holmes' autopsy did in fact exist. *Id.* at ¶ 6. The Holmes family made arrangements to ship the slides from the Pierce County Medical Examiner's office to the University of Pittsburgh in June 2015 for evaluation by board-certified neuropathologist Ronald Hamilton, M.D. Dr. Hamilton received the brain tissue samples on June 10, 2015. On August 4, 2015, Dr. Hamilton positively diagnosed Ronald Holmes with CTE. On April 11, 2017, following the March 23, 2017 opening of the Monetary Awards Claims Process period, Petitioner submitted a Claim to the NFL seeking a monetary award for death with CTE. The submission included the requisite certifications and all supporting documentation.

B. The Claims Administrator's Denial of Petitioner's Claim for Monetary Damages

On June 13, 2017, the Claims Administrator rejected Petitioner's claim. *See* the June 13, 2017 Notice of Denial of Monetary Award Claim, attached as Exhibit B. The Claims Administrator's sole justification for the denial was Petitioner's failure to meet the Qualifying Diagnosis deadline set forth in Section 6.3(f) of the Settlement Agreement. *Id.* On July 11, 2017, Petitioner submitted an appeal to the Claims Administrator, explaining the extenuating circumstances and requesting that his claim be approved notwithstanding Decedent's post-mortem CTE diagnosis a mere three and a half months beyond the Qualifying Diagnosis deadline. *See* Exhibit A (July 11, 2017 Appeal). On August 21, 2017, the NFL issued a memorandum supporting the denial of Petitioner's Appeal. *See* the Response of the NFL Parties in Opposition to the Appeal of Claim Determination Filed by Ronald Holmes, attached as Exhibit C. As explained below, the NFL's insistence that equitable tolling is inapplicable is contrary to the law. On December 22, 2017, the Special Master rejected Petitioner's appeal, again citing the Qualifying Diagnosis deadline. *See* the December 22, 2017 Post-Appeal Notice of Denial of Monetary Award Claim, attached as Exhibit D.

C. The Settlement Agreement Recognizes Similar Extenuating Circumstances

Multiple clauses in the Settlement Agreement make clear that the parties did not intend the monetary claims terms to be rigid formulas not amenable to extenuating circumstances. Indeed, the Settlement Agreement expressly acknowledges situations where, despite due diligence, a Retired NFL Player or his legal representative is unable to obtain the requisite medical records or is otherwise rendered unable to meet the Claim Package submission deadline due to situations outside of his or her control:

In cases where a deceased Retired NFL Football Player received a Qualifying Diagnosis but the medical records reflecting the Qualifying Diagnosis are unavailable because of a force majeure

type event (e.g., flood, hurricane, fire), *the Claims Administrator, upon petition by the Representative Claimant, may determine the Claim Package to be valid without the medical records if the Representative Claimant makes a showing of reasonable effort to obtain the medical records from any available source and presents a certified death certificate referencing the Qualifying Diagnosis made while the Retired NFL Football Player was living...If the unavailability of medical records also causes the diagnosing physician to be unable to provide a Diagnosing Physician Certification, the Claims Administrator, upon petition by the Representative Claimant, and in addition to the presentation of a certified death certificate referencing the Qualifying Diagnosis made while the Retired NFL Football Player was living, may instead allow an accompanying sworn affidavit from diagnosing physician attesting to the reasons why the diagnosing physician is unable to provide a Diagnosing Physician Certification without the medical records.*

See Doc 6481-1 (Settlement Agreement) at Section 8.2(ii)(emphasis added).

Claim Packages must be submitted to the Claims Administrator no later than two (2) years after the date of the Qualifying Diagnosis or within two (2) years after the Settlement Class Supplemental Notice is posted on the Settlement Website, whichever is later. Failure to comply with this two (2) year time limitation will preclude a Monetary Award for that Qualifying Diagnosis, *unless the Settlement Class Member can show substantial hardship that goes beyond the Retired NFL Player's Qualifying Diagnosis and that precluded the Settlement Class Member from complying with the two (2) year deadline, and submits the Claims Package within four (4) years after the date of the Qualifying Diagnosis or after the Settlement Class Supplemental Notice is posted on the Settlement Website, whichever is later.*

See Doc 6481-1 (Settlement Agreement) at Section 8.3(a)(i)(emphasis added).

III. STANDARD OF REVIEW

Under Section 27.1 of the Settlement Agreement, this Court has continuing and exclusive jurisdiction over all parties, including the Claims Administrator and the Special Master, with respect to the terms of the Settlement and has authority to resolve any disputes arising thereof upon motion to the Court. *See Doc 6481-1 (Settlement Agreement) at Section 27.1.* The

Settlement Agreement further provides that in resolving such disputes, the Court will make a final and binding determination based upon a showing by the appellant of clear and convincing evidence. *Id.* at Section 9.8. In its discretion, the Court may be assisted by any member of the Appeals Advisor Panel and/or an Appeals Advisory Panel Consultant. *Id.*

IV. ARGUMENT

“The Court has general equitable power to modify the terms of a class action settlement.” *Sutton v. Hopkins County*, 2009 U.S. Dist. LEXIS 95229, *8 (W.D. KY 2009)(citing *In re CENDANT Corp.*, 189 F.R.D. 321, 323 (D.N.J. 1999)). “Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers...to protect unnamed, but interested persons.” *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972). “A Court may assert this power to allow late-filed proofs of claim and late-cured proofs of claim.” *Id.*; see also *In re "Agent Orange" Product Liability Litig.*, 689 F. Supp. 1250, 1263 (E.D.N.Y. 1988); Manual For Complex Litig. § 30.47 at 248 (3d ed. 1995). Courts considering requests to extend deadlines for filing proofs of claim and other settlement documents generally subject the request to a “good cause” or “excusable neglect” analysis. *Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 396 (3d Cir. 1981); *In re CENDANT Corp.*, 189 F.R.D. at 323 (citations omitted).

Fed. R. Civ. P. 60(b) provides that on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding in the case of mistake, inadvertence, surprise, excusable neglect or any other reason that justifies relief. Fed. R. Civ. P. 60(b)(1) and (6). The determination of whether a party’s neglect is “excusable” is an equitable one, in which courts are to take into account all relevant circumstances surrounding a party’s failure to meet a deadline. *Chemetron Corp. v. Jones*, 72 F.3d 341, 349 (3d Cir. 1995)(citing *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)). In *Pioneer*, the U.S.

Supreme Court identified several factors to consider in evaluating “excusable neglect”, including the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Pioneer Inv. Servs.*, 507 U.S. at 395; *see also Nara v. Frank*, 488 F.3d 187, 193 (3d Cir. 2007).

Petitioner’s request satisfies a “good cause” analysis and each of the *Pioneer* factors: there is no material prejudice to the NFL because the Decedent was diagnosed with CTE based on brain tissue samples taken during an autopsy performed well before the Qualifying Diagnosis deadline and Petitioner timely submitted his Claims Package, Petitioner’s delay in obtaining the Qualifying Diagnosis was minimal (approximately three and a half months), and the delay was due solely to circumstances outside of Petitioner or Counsel’s control—namely the medical examiner’s misrepresentation as to whether brain tissue samples had been preserved following Ronald Holmes’ autopsy. Moreover, Petitioner and Counsel exercised due diligence in investigating the existence of and eventually obtaining the brain tissue preserved at the time of the autopsy for evaluation once its existence was discovered. The totality of the circumstances clearly establish “good cause” for the brief delay in obtaining Decedent’s Qualifying Diagnosis and warrant a finding of “excusable neglect” under Fed. R. Civ. P. 60(b)(1). *Wallace v. Powell*, 2013 U.S. Dist. LEXIS 89176 (M.D. Pa. June 24, 2013)(finding “excusable neglect” and directing a claims committee to accept two plaintiffs’ claims after the claims committee failed to receive timely proof of claims forms for their participation in a court-approved settlement); *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977)(affirming district judge’s decision that he “would have discretion to permit a claim and allow a late claim when there’s good and sufficient cause shown therefor”); *see also In re Vitamins Antitrust Litig.*, 2002 U.S. Dist.

LEXIS 25790 (D.D.C. 2002)(finding “excusable neglect” and permitting class member to opt-out of settlement class beyond deadline).

Petitioner is not asking this Court to “rewrite the terms” of the Settlement Agreement. Courts have clear discretion to apply equitable tolling when class members submit claims that are technically untimely under the written terms of a settlement agreement. *In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, 2017 U.S. Dist. LEXIS 34005, *27-28 (E.D. Pa. Mar. 9, 2017). In *In re Diet Drugs Prods. Liab. Legit.*, this Court considered whether equitable tolling was warranted when a class member sought relief from the denial of her claim due to her failure to meet a settlement matrix’s statute of limitations. *Id.* at *27-8. Though it found that equitable tolling was not justified in the particular circumstances of that case, this Court acknowledged and applied the Third Circuit’s three-factor test for equitable tolling before reaching that conclusion:

Finally we review the determination of the Arbitrator that Ms. Schlager's 2014 stroke did not toll the statute of limitations set by CAP 16 as to her claim. Ms. Schlager argues that it should have been assumed that serious complications would occur following the stroke of a 77-year-old person such as Ms. Schlager. According to her, the deadline set by CAP 16 should have been tolled due to her serious health issues. Our Court of Appeals has identified three principal, non-exclusive situations in which equitable tolling may be appropriate: “(1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action; (2) *where the plaintiff in some extraordinary way has been prevented from asserting his or her rights*; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.” *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994). The plaintiff bears the burden of presenting facts necessary to justify equitable tolling. *Byers v. Follmer Trucking Co.*, 763 F.2d 599, 600-01 (3d Cir. 1995); *Smith v. Shared Medical System*, 2004 U.S. Dist. LEXIS 14306, 2004 WL 1656635 at * 4 (E.D. Pa. July 23, 2004). The record does not demonstrate how or why her medical condition prevented her from submitting a completed Green Form within the deadlines set forth by CAP 16.

Id. (emphasis added).

Here, unlike the claimant in *In re Diet Drugs Prods. Liab. Legit.*, Petitioner has made a clear showing that he was prevented from asserting his rights in some extraordinary way. For this additional reason, Petitioner has established, through clear and convincing evidence, that this Court should set aside the Special Master's denial of Petitioner's claim.

V. CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court set aside the Special Master's Denial of Petitioner's Monetary Award Claim and enter the attached Order compelling the Claims Administrator to recognize the Decedent's Qualifying Diagnosis of CTE as timely.

Dated: January 19, 2018

RESPECTFULLY SUBMITTED,

/s/ Sol H. Weiss

Sol H. Weiss, Esquire (I.D. 15925)

Larry E. Coben, Esquire (I.D. 17523)

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EXHIBIT A

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July 11, 2017

Claims Administrator
NFL Concussion Settlement
PO Box 25369
Richmond, VA 23260

**Re: Appeal of Notice of Denial of Monetary Award Claim
Holmes #950000708**

Dear Sir/Madam:

Please accept this letter as our official Appeal of Notice of Denial of Monetary Award Claim. Ronald Holmes played 8 seasons (1985-1992) for the NFL, four with the Tampa Bay Buccaneers and four with the Denver Broncos. He was a starting Defensive End for the Broncos in Super Bowl XXIV.

Ronald Holmes died on October 27, 2011. A routine autopsy was performed by the Pierce County Medical Examiner. His estate obtained the written report that found no abnormal brain findings. It made no mention of any brain tissue being preserved.

Mr. Holmes did exhibit some neurologic deficits in his last years of life. His Estate formally retained counsel in August 2013. Records were gathered to determine if Mr. Holmes had been diagnosed with Dementia or Alzheimer's Disease. The Autopsy report did not find a pathological disease pertinent to this claim. Nevertheless, Counsel contacted the Medical Examiner's Office in May 2014 to inquire about any remaining tissue from the autopsy and we were advised that no brain tissue was preserved. Counsel continued to work on this case seeking and searching other neurology records to qualify the decedent for neurocognitive benefits. Subsequent records did not establish a diagnosis of dementia or Alzheimer's. In April 2015 the family again contacted the medical examiner. At this time, the family was informed in a second follow-up call that brain tissue slides did exist. Arrangements were made to ship the slides from the Pierce County Medical Examiner's Office to the University of Pittsburgh in June 2015. Dr.



July 11, 2017

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Hamilton, a well-regarded neuro-pathologist received the slides, studied them and issued a Report on August 4, 2015. Dr. Hamilton's report confirms that Mr. Holmes died with CTE. (See Neuropathology Consultation Report attached).

Based on the foregoing the Estate acted prudently when it discovered the existence of contemporaneous tissue slides. Until April 2015, the Estate believed no brain tissue had been preserved. The Holmes' Estate should not be penalized by the confusion in the Pierce County Medical Examiner's Office. There is no real prejudice to the NFL Parties because Ronald Holmes died from CTE in 2011 and the Estate through counsel diligently sought to obtain the slides. *See Ragguette v. Premier Wines & Spirits*, 691 F.3d 315 (3d Cir. 2012)(citing *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)(holding that relief from a judgment or order is available under Fed. R. Civ. P. 60(b) upon a showing of "excusable neglect" taking into account all relevant circumstances, including prejudice to the non-movant, the length of the delay, the reason for the delay, including whether it was within reasonable control of the movant, and whether the movant acted in good faith); *see also Avon Contrs., Inc. v. Sec'y of Labor*, 372 F.3d 171 (3d Cir. 2004)(finding excusable neglect due to factors outside the moving party's control and the movant's late discovery of same); *Mays v. Wakefern Food Corp.*, 2002 U.S. Dist. LEXIS 14119 (E.D. Pa. 2002)(finding excusable neglect where, despite diligence, plaintiff was unable to meet case deadlines).

Mr. Holmes lived and died in Washington. Washington law provides that the statute of limitations applicable to a wrongful death action (3 years) is automatically tolled until the decedent's family has a reasonable cause to believe that the decedent was a victim of a wrongful death. *White v. Johns Manville Corp.*, 103 WN. 2d 344 (1985). This principle of law is, of course, embodied in Section 6.2 (b) of the Settlement Agreement which provides:

(b) A Representative Claimant of a deceased Retired NFL Football Player will be eligible for a Monetary Award only if the deceased Retired NFL Football Player died on or after January 1, 2006, or if the Court determines that a wrongful death or survival claim filed by the Representative Claimant would not be barred by the statute of limitations under applicable state law as of: (i) the date the Representative Claimant filed litigation against the NFL (and, where applicable, NFL Properties) relating to the subject matter of these lawsuits, if such a wrongful death or survival claim was filed prior to the Settlement Date; or (ii) the Settlement Date, where no such suit has previously been filed.

In accordance with applicable law, the Death by CTE claim would be tolled until the discovery of the preserved tissue. The action pursued by the Holmes' Estate is not time-barred under Washington law and Section 6.2(b) governs the resolution of this matter. The language of Section 6.3(f) should be equitably applied under the unique facts of this case. We also attach a declaration from Josh Cohan, an associate working on the Holmes file, which confirms this Firm and the client's due diligence in learning of the decedent's causative fatal illness (CTE).

July 11, 2017
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We respectfully request that the denial of benefits be overruled.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Sol H. Weiss".

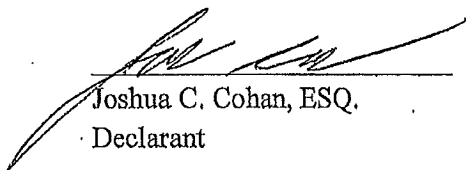
Sol H. Weiss

SHW/bmb

Declaration of Joshua C. Cohan, Esq.

I, Joshua C. Cohan, declare as follows:

1. I am an associate lawyer at Anapol Weiss located at 130 N. 18th Street, Suite #1600, Philadelphia, PA 19103.
2. As an associate attorney my responsibilities included individual client supervision for In Re: National Football League Players' Concussion Injury Litigation. This included the claim involving former NFL player Ronald Holmes (deceased).
3. In an effort to confirm a post-mortem diagnosis of CTE, on March 28, 2014, I requested that my paralegal, James Mahan, contact the Medical Examiner's office that performed Mr. Holmes' autopsy to determine if any of Mr. Holmes' brain tissue had been preserved.
4. Mr. Mahan informed me on two separate occasions that no brain tissue had been preserved.
5. On May 21, 2014, I emailed Mr. Holmes' family to advise them that we had contacted the Medical Examiner's office and that they informed us that none of Mr. Holmes' brain tissue was preserved. I then proceeded to collect additional medical records in an effort to determine if Mr. Holmes had been diagnosed with dementia or Alzheimer's disease. No such diagnoses were ever made.
6. In April of 2015, I spoke with Mr. Holmes' family and they informed me that they had recently contacted the Medical Examiner's office and that the office was unsure whether any of Mr. Holmes' brain tissue was preserved. Mr. Holmes' family later informed me that they learned that some of Mr. Holmes' brain tissue was preserved. This was the first time that I or anyone at Anapol Weiss learned, contrary to what we were told in May 2014 by the Pierce County Medical Examiner's Office, that Mr. Holmes' brain tissue was preserved.
7. Mr. Holmes' family requested that they handle obtaining and testing the samples. The family did receive the report from Ronald L. Hamilton M.D. Associate Professor of Pathology, University of Pittsburgh School of Medicine on or about August 4, 2015.


Joshua C. Cohan, ESQ.

Declarant

Date: July 11, 2017

EXHIBIT B

NFL**CONCUSSION SETTLEMENT**IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)**NOTICE OF DENIAL OF MONETARY AWARD CLAIM****DATE OF NOTICE: June 13, 2017****DEADLINE TO APPEAL: July 13, 2017****I. SETTLEMENT CLASS MEMBER INFORMATION**

Settlement Program ID	950000708		
Name:	First Jeffrey	M.I. M	Last Holmes
Settlement Class Member Type	Representative Claimant		
Primary Counsel	Anapol Weiss		

II. EXPLANATION OF CLAIM DETERMINATION

This Notice is an official communication from the Claims Administrator for the NFL Concussion Settlement Program. We reviewed your Claim Package and determined that you are not entitled to a Monetary Award for the following reason(s):

1. The Retired NFL Football Player died on or before July 7, 2014, but did not receive a post-mortem diagnosis of Death with CTE before the Final Approval Date of the Settlement Agreement, which was April 22, 2015. Section 6.3(f) of the Settlement Agreement requires that a Qualifying Diagnosis of Death with CTE be made before the Final Approval Date of the Settlement Agreement if the Retired NFL Football Player died before July 7, 2014. If the Retired NFL Football Player received a different Qualifying Diagnosis while he was living (i.e., Level 1.5 Neurocognitive Impairment, Level 2.0 Neurocognitive Impairment, Alzheimer's Disease, Parkinson's Disease, or ALS), you may submit a new Claim Package for that Qualifying Diagnosis for review by the Claims Administrator. The new Claim Package must contain a Pre-Effective Date Diagnosing Physician Certification, an updated Claim Form, and medical records that reflect the newly asserted Qualifying Diagnosis.

III. YOUR RIGHT TO APPEAL THIS DETERMINATION

If you have a good faith belief that the decision to deny your Monetary Award claim is incorrect, you may appeal this determination to the Court under Section 9.5 of the Settlement Agreement. To do so, click the Appeal Denied Monetary Award button on your secure online portal and follow the instructions provided. You must submit supporting evidence to support your appeal. Any written statement may not be more than five single-spaced pages. You must do so on or before the Deadline to Appeal stated at the top of this Notice.

If you decide to appeal, you must pay a fee of \$1,000 using the online PayPal option or by check made payable to the NFL Claims Administrator. This fee will be refunded if your appeal is successful. If you are unable to pay the \$1,000 fee, you may make a hardship request to us to waive the fee and will have to submit financial information showing a sufficient hardship.

If paying the \$1,000 Appeal Fee by check, mail the check to the address below.

NFL Concussion Settlement
Claims Administrator
P.O. Box 25369
Richmond, VA 23260



The Court or the Special Master appointed by the Court to oversee the administration of the Settlement Program will decide your appeal based upon a showing by you of clear and convincing evidence. The Court's decision will be final and binding. The Special Master's factual determinations will be final and binding, but you or Co-Lead Class Counsel or the NFL Parties may object to any of the Special Master's conclusions of law, which will then be subject to de novo (*i.e.*, a new) review by the Court.

If an appeal is not submitted on or before the deadline stated at the top of this Notice, the determination in this Notice will become final.

IV. CO-LEAD CLASS COUNSEL'S RIGHT TO APPEAL THIS DETERMINATION

Section 9.5 of the Settlement Agreement also gives Co-Lead Class Counsel the right to challenge our decision to deny your Monetary Award claim. If Co-Lead Class Counsel chooses to appeal, it must do so by the Deadline to Appeal stated at the top of this Notice and must provide a written copy of its Appeals Form and any supporting evidence to you, the NFL Parties, and us.

If an appeal is taken by you or Co-Lead Class Counsel, the NFL Parties may submit a written opposition (not to exceed five single-spaced pages) no later than 30 days after receipt of the Appeals Form. The party taking the appeal is not permitted to submit a reply.

Co-Lead Class Counsel may also submit a written statement (not to exceed five single-spaced pages) in response to your appeal no later than 15 days after receipt of the Appeals Form, and you and the NFL Parties may each submit a reply to any such submission by Co-Lead Class Counsel.

V. HOW TO CONTACT US WITH QUESTIONS OR FOR HELP

If you are represented by a lawyer, consult with your lawyer if you have questions or need assistance. If you are unrepresented and have any questions about this Notice or need help, contact us at 1-855-887-3485 or send an email to ClaimsAdministrator@NFLConcussionSettlement.com. If you are a lawyer, call or email your designated Firm Contact for assistance. For more information about the Settlement program, visit the official website at www.NFLConcussionSettlement.com to read the Frequently Asked Questions or download a copy of the complete Settlement Agreement.



EXHIBIT C

**Response of the NFL Parties in Opposition to the
Appeal of Claim Determination Filed by Ronald Holmes**

The appeal of Claimant Jeffrey Holmes ignores the crystal clear language of the Settlement Agreement and should be rejected.

Background

Retired NFL Football Player Ronald Holmes (“Holmes”) died on October 27, 2011. (July 11, 2017 Letter from Sol Weiss to BrownGreer (the “Appeal Letter”) at 1.) Although Claimant’s submission does not state a cause of death, public reports state that Holmes “had been battling diabetes and coronary issues.”¹ According to Claimant, Holmes did not receive a diagnosis of dementia or Alzheimer’s Disease during his lifetime. (Appeal Letter at 1.)

Claimant Jeffrey Holmes is the administrator of Holmes’ estate and a Representative Claimant for the purposes of the Settlement program. He submitted a Monetary Award claim for a Qualifying Diagnosis of Death with CTE. Pursuant to Section 6.3(f) of the Settlement Agreement:

A Qualifying Diagnosis of Death with CTE shall be made only for Retired NFL Football Players who died prior to the [April 22, 2015] Final Approval Date, through a post-mortem diagnosis made by a board-certified neuropathologist *prior to the [April 22, 2015] Final Approval Date*

Id. (emphasis added); *see also* Settlement Agreement Injury Definitions for “Death with CTE” (stating same limitation).

Here, Claimant relies on a post-mortem diagnosis of CTE made on August 4, 2015—over three months *after* the Final Approval Date and nearly four years after Holmes’ death. Under the clear definition contained in the Settlement Agreement, the Claims Administrator properly denied the claim.

Claimant’s Appeal Arguments Do Not Alter the Underlying Deficiency

Conceding that he missed the clear definitional deadline set forth in the Settlement Agreement, Claimant advances two arguments in support of his appeal. Neither changes the fundamental fact that his claim does not meet the clear requirements of Section 6.3(f) of the Settlement Agreement and the related definition of the “Death with CTE” Qualifying Diagnosis.

¹ See Bob Condotta, *Former Huskies Defensive Line Star Ron Holmes Dies*, Seattle Times (last updated Oct. 28, 2011), available at <http://www.seattletimes.com/sports/uw-huskies/former-huskies-defensive-line-star-ron-holmes-dies/>.

First, Claimant argues that he “should not be penalized” because he learned too late that the Medical Examiner of Holmes’ body had preserved brain tissue that could be studied for a post-mortem CTE diagnosis. (Appeal Letter at 2.) Claimant argues that he is entitled to an equitable remedy because his counsel initially received incorrect information from the Medical Examiner, and Claimant otherwise may have complied with the Settlement terms. The Settlement Agreement does not provide for any such relief. The Parties did not agree to any exception—equitable or otherwise—for non-compliance with the requirements of Section 6.3(f) and the definition of “Death with CTE.”²

Nonetheless, Claimant cites case law concerning the “excusable neglect” standard for missing an appellate deadline under Federal Rule of Appellate Procedure 4(a)(5) (citing *Ragguette*) and for reopening judgments within one year under Federal Rule of Civil Procedure 60(b)(1) (citing *Pioneer*, *Avon*, and *Mays*). (Appeal Letter at 2.) These holdings are wholly inapposite to compliance with the terms of this judicially-approved Settlement Agreement. Here, amendment of the terms of the Settlement Agreement requires written agreement of the Parties. See Settlement Agreement § 30.6 (“This Settlement Agreement will not be subject to any change, modification, amendment, or addition without the express written consent of Class Counsel and Counsel for the NFL Parties, on behalf of all Parties to this Settlement Agreement, and upon Court approval.”).

Moreover, federal courts do not maintain the power to alter the terms of a Settlement Agreement, such as the definition of a Qualifying Diagnosis for Death with CTE. See, e.g., *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 312 (3d Cir. 2011) (finding that it is “well established” that settlement agreements are “creatures of private contract law” and that a district court cannot modify their terms (internal citations omitted)); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010) (holding that a “district court is not a party to the settlement, nor may it modify the terms of a voluntary settlement agreement between parties” because Rule 23 “does not vest [in the district court the] broad powers to intrude upon the parties’ bargain”); *In re Diet Drugs Prods. Liability Litig.*, 553 F. Supp. 2d 442, 490 (E.D. Pa. 2008) (“The Supreme Court has stated: ‘Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but ... does not authorize the court to require the parties to accept a settlement to which they have not agreed.’ . . . We have no power to modify any terms and force acceptance on the parties to the agreement” (internal citations omitted)).

Here, the Settlement’s definition of “Death with CTE” was heavily negotiated, as this Court is well aware. It withstood the scrutiny of this Court and the Third Circuit

² Claimant also does not provide sufficient information to determine whether he could have complied with the Settlement terms despite the initial miscommunication with the Medical Examiner. Claimant states that the Medical Examiner informed the family in “April 2015” that brain tissue slides existed. (See Appeal Letter at 1.) This vague assertion does not provide information on whether that communication occurred before or after the April 22, 2015 deadline for a diagnosis. Regardless, the family waited two months—until June 2015—to send the slides for examination by a neuropathologist. (*Id.*)

Court of Appeals, and should be enforced according to its terms, which Claimant does not meet.

Second, Claimant argues that his Death with CTE claim in the Settlement program should be “equitably tolled” because any wrongful death claim he otherwise could have filed in litigation purportedly would have been tolled under Washington state law. (Appeal Letter at 2.) Claimant’s argument misses the point entirely. The issue is not whether the statute of limitations had run on his claim. Rather, the issue is whether Claimant meets the requirements of the negotiated Settlement Agreement. He does not.

Claimant cites to Section 6.2(b) of the Settlement Agreement, which concerns the viability of claims by Representative Claimants of retired players who died prior to January 1, 2006. Again, Settlement Class Members who did not opt out of the Settlement Class must comply with the written terms of the Settlement Agreement as negotiated and judicially approved. Claimants cannot ask the Court to rewrite the terms. Moreover, Claimant’s reliance on Section 6.2(b) of the Settlement Agreement is misplaced; even if Holmes had died prior to 2006, as opposed to in October 2011, Claimant still would have needed to receive a CTE diagnosis by April 22, 2015 in order to recover on a claim for the Qualifying Diagnosis of Death with CTE.

Conclusion

For the reasons set forth above, BrownGreer issued the proper claim determination with respect to Claimant’s submission. Holmes did not receive a diagnosis of dementia or Alzheimer’s during his lifetime, and Claimant did not receive a post-mortem diagnosis of CTE for Holmes prior to the April 22, 2015 deadline, as the Settlement Agreement requires. In short, Claimant did not comply with the requirements for a valid Qualifying Diagnosis of Death with CTE. The terms of the Settlement Agreement are clear on the issue raised on appeal and require denial.

Dated: August 21, 2017

Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

/s/ Brad S. Karp

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*ATTORNEYS FOR THE
NATIONAL FOOTBALL LEAGUE
AND NFL PROPERTIES LLC*

EXHIBIT D

NFL**CONCUSSION SETTLEMENT**IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)**POST-APPEAL NOTICE OF DENIAL OF MONETARY AWARD CLAIM****DATE OF NOTICE: December 22, 2017****I. SETTLEMENT CLASS MEMBER INFORMATION**

Settlement Program ID	950000708		
Name:	First Jeffrey	M.I. M	Last Holmes
Settlement Class Member Type	Representative Claimant		
Primary Counsel	Anapol Weiss		
Asserted Qualifying Diagnosis	Death with CTE (Chronic Traumatic Encephalopathy)		
Appellant	Settlement Class Member		
Appellee	NFL		

II. EXPLANATION OF CLAIM DETERMINATION

This Notice is an official communication from the Claims Administrator for the NFL Concussion Settlement Program. The Special Master reviewed the appeal and determined the following, which is final and binding:

Appeal Denied. Appellant did not prove by clear and convincing error in the decision of the Claims Administrator.

1. Representative Claimants for deceased Retired NFL Football Players are not eligible for the Baseline Assessment Program.
2. The Retired NFL Football Player died on or before July 7, 2014, but did not receive a post-mortem diagnosis of Death with CTE before the Final Approval Date of the Settlement Agreement, which was April 22, 2015. Section 6.3(f) of the Settlement Agreement requires that a Qualifying Diagnosis of Death with CTE be made before the Final Approval Date of the Settlement Agreement if the Retired NFL Football Player died before July 7, 2014. If the Retired NFL Football Player received a different Qualifying Diagnosis while he was living (i.e., Level 1.5 Neurocognitive Impairment, Level 2.0 Neurocognitive Impairment, Alzheimer's Disease, Parkinson's Disease, or ALS), you may submit a new Claim Package for that Qualifying Diagnosis for review by the Claims Administrator. The new Claim Package must contain a Pre-Effective Date Diagnosing Physician Certification, an updated Claim Form, and medical records that reflect the newly asserted Qualifying Diagnosis.

III. HOW TO CONTACT US WITH QUESTIONS OR FOR HELP

If you are represented by a lawyer, consult with your lawyer if you have questions or need assistance. If you are unrepresented and have any questions about this Notice or need help, contact us at 1-855-887-3485 or send an email to ClaimsAdministrator@NFLConcussionSettlement.com. If you are a lawyer, call or email your designated Firm Contact for assistance. For more information about the Settlement program, visit the official website at www.NFLConcussionSettlement.com to read the Frequently Asked Questions or download a copy of the complete Settlement Agreement.

